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IN THE

Supreme Court of The United States

October Term, 1968

No. 901

ALLEN F. BARKER, DONALD STEVEN HILL, THOMAS MALONE, TERRY MILLER, CHARLES E. NEWBOLD, CARMEN PILGRIM, ALONZO SAUNDERS, ALBERT SMITH, SHARON MARIA SMITH, and ALLEN SCOTT TUCKER,

Petitioners,

vs.

WENDELL G. HARDWAY, President of Bluefield State College; J. I. TURNER, Dean of Men of Bluefield State College; WANDA MOORE, Dean of Women of Bluefield State College; and WEST VIRGINIA STATE BOARD OF EDUCATION, a Public Body Corporate,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Whether the First and Fourteenth Amendments to the United States Constitution *restrict or* preclude officials at a state-supported institution of higher learning from initiating and conducting disciplinary proceedings against students who violate institutional rules and regulations by engaging in riotous and disruptive conduct which endangers the life, property, administration and well-being of the institutional community by any disciplinary procedure other than a formal trial type procedure 1

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Whether the First and Fourteenth Amendments to the United States Constitution restrict or preclude officials at a state-supported institution of higher learning from initiating and conducting disciplinary proceedings against students who violate institutional rules and regulations by engaging in riotous and disruptive conduct which endangers the life, property, administration and well-being of the institutional community by any disciplinary procedure other than a formal trial type procedure.

STATEMENT OF THE CASE

In accordance with the usage adopted in the petitioners' brief, references will be made herein to the transcript of the evidence adduced in the federal district court (T. ____). In addition, due to the generality of the questions presented by petitioners and the inadequacy of their statement of the case, the respondents submit the following as a more realistic summary of the circumstances involved herein upon which the district court and Court of Appeals predicated their respective decisions.

The respondent, Dr. Wendell G. Hardway, was appointed President of Bluefield State College (BSC) by the State Board of Education and assumed that position in July, 1966 (T. 158, 309). Shortly thereafter, Dr. Hardway requested the academic dean to assist him in recruiting additional Negro teachers for BSC and, accordingly, Dean Brown conducted a concentrated recruitment program (T. 1062-1064). Also, inasmuch as a student handbook had not been printed for the previous year (T. 309, 1123), Dr. Hardway appointed the Director of Guidance, S. E. Cary, chairman of a committee to prepare a student handbook which would include disciplinary procedures not expressly covered in previous handbooks (T. 312; Respondents' Ex. 21).

Although there had been a student affairs committee at BSC for several years (T. 827, 903, 974), it was reorganized by Dr. Hardway in May, 1967 (T. 828, 953, 987), while the handbook was being prepared for printing (T. 991). As a result, the committee membership was increased from four to six members and

the administrative officers were replaced by teaching faculty members, one of whom had an academic specialization in the field of guidance counseling (T. 337, 951). The composition of this committee, with reference to race, was equally divided (T. 202).

The 1967-1968 academic year began in September, 1967, and the administration was plagued with problems from the beginning. Due to personnel shortages, it was necessary to close the Student Union earlier than was desirable to either the students or the administration (T. 879, 881). The student leaders were advised of the problem and assured that it would be remedied as soon as possible (T. 881, 882, 1072). Nevertheless, some students and two faculty members, Janet Hall and Emma Sue Phelps, protested by conducting sit-ins and prevented the closing of the Student Union even at the regularly scheduled time (T. 469-470, 882). Closing hours and scheduling of activities in the Student Union were governed by rules and regulations promulgated by a joint student-administration board (T. 877). This personnel problem was resolved around the first week of October (T. 880).

During freshman orientation week, respondent Joseph I. Turner, Dean of Men, observed some freshmen students on the campus with their heads shaved, and called a meeting of the upperclassmen who were residing in the dormitory to advise them that "hazing" violated State law and College regulations (T. 835, 836). The following day one of the petitioners herein, Allen Barker, went to Dean Turner's office and complained that five or six students had attempted to shave his head the night before in the dormitory and he had suffered an epileptic seizure (T. 831).

Barker identified his assailants from year-book pictures and Dean Turner made a report of the incident to the chairman of the student affairs committee (T. 833; Respondents' Ex. No. 7).

On September 8, a hearing was scheduled by the student affairs committee to investigate Dean Turner's charges and Barker appeared before the committee, identified his assailants, one of whom was petitioner Alonzo Saunders, the only non-dormitory student involved. Each of the students involved appeared and gave his account of the incident; Dean Turner also appeared and presented evidence. The committee reconvened on September 11 to take additional evidence and Marcella Haynes, student council president, appeared to advise the committee that the student body supported the cause of the students accused of "hazing" Barker. The committee reconvened on September 14 and again took testimony from the victim and the participants and recommended that the dormitory participants be denied residence in the dormitory for the remainder of the school year and restricted from entering the dormitory for that period. Since petitioner Saunders was not a dormitory resident and was enrolled under Title 38 of the Veterans Law subject to good conduct and performance, the committee recommended the incident be reported to the Veterans Administration with the stipulation that no action be taken regarding his benefits (Respondents' Ex. No. 14; T. 841, 934). Dean Turner complied with the committee's recommendation and advised the Veterans Administration by letter dated September 18 (Respondents' Ex. No. 1).

On September 11, a group of students conducted a demonstration protesting any punishment as a result of the "hazing" incident (T. 933), and that night held a meeting in the Student Union. Dr. Hardway, accompanied by Dean Brown, appeared and stood in the back of the room (T. 215, 1071, 1088). The students asked Dr. Hardway to come up to the platform and began interrogating him. The questioning was conducted in a hostile manner and was accompanied by laughter and acts of hostility (T. 1071). However, Dr. Hardway attempted to answer their questions and suggested that the students form a committee and present their grievances to the administration (T. 215).

On September 16, there was a fracas between the students of BSC and Concord College at a football game and Dean Turner, at Dr. Hardway's request, conducted an investigation (T. 842; Respondents' Ex. No. 8). Dr. Hardway gave Dean Turner a list of names of both Negro and white students and after his investigation Dean Turner wrote identical letters of warning to the Negro and white students involved (T. 845-852; Respondents' Ex. Nos. 9 and 11).

On September 29, Mr. Cecil Moore, an attorney from Philadelphia and alumnus of BSC, spoke to a group of students at an unscheduled, unauthorized meeting in the Student Union (T. 883, 884, 898, 899). The director of the Student Union had noted an unusual amount of activity that day and was rebuked when he attempted to learn if someone was to appear on the campus. It was not until later that day, after receiving a complaint from a student that the crowd was blocking access to the bookstore and gameroom, that he learned of the meeting (T. 884, 898).

After Mr. Moore's appearance at BSC the sit-ins continued at the Student Union and on the night of October 2, there was a fire in Arder Hall, the old gymnasium. While firemen were performing their duties, a large number of students were demonstrating nearby by cheering, singing and making speeches (T. 1072, 1073). At the request of the fire chief, Dean Brown dispersed the mob and then attended a meeting of a group of students at the Student Union who had expressed concern about somebody burning the girls' dormitory. These students made inquiries concerning police protection and at Dean Brown's request, a State Policeman assured the students and the dormitory matron that they would remain as long as was necessary to protect the building. (T. 1073, 1074).

Earlier that same day the student affairs committee had discussed the disturbances which had been occurring on the campus and, in an effort to ease the tensions, invited the Student Council President and others to an informal meeting. However, the following day a representative of the Student Council appeared at the committee meeting and presented a letter rejecting the invitation and advising the committee that all future correspondence between them would be in writing (T. 963, 964; Respondents' Ex. No. 12).

About this same time, Dr. Hardway wrote the President of the Student Council asking for a meeting between the administration and students at a time and place to be set by the students. Dean Brown delivered this letter to the Student Council President and thereafter Dr. Hardway was advised that the students would meet at their own convenience but no date or time was specified (T. 328, 1066). On October 5, at

10:00 a.m., without prior notice, the students appeared at Dr. Hardway's office and wanted a meeting with all administrative officials; Dr. Hardway immediately contacted them and told them to drop whatever they were doing and attend the meeting (T. 327, 922). The students were accompanied by a lawyer and recorded the discussion on a tape recorder (T. 124, 922, 923). This meeting lasted about 2-1/2 to 3 hours and the attitude and demeanor of the students was one of hostility and rudeness (T. 924, 1067). Although the students agreed to give Dr. Hardway a month to attempt to correct their grievances (T. 1028), two hours after the meeting the President of the Student Council and President of Interfraternity Council notified Dean Moore of the cancellation of all activities by their respective organizations until further notice. (T. 1043; Respondents' Ex. No. 20.)

Later, as a result of an accusation made by Carolyn Bratton at the October 5 meeting, Dean Moore, by memo, requested Carolyn to come to her office; Carolyn appeared with her attorney and the conference was conducted (T. 1023). Dr. Hardway requested a conference with this student but she refused to participate when Dr. Hardway declined to permit her attorney to be present (T. 127, 329). Thereafter, charges were filed with the student affairs committee against Carolyn Bratton and Alonzo Saunders. By letter dated October 10, the committee notified each of them of the specific charges and of their rights; Carolyn Bratton's hearing was scheduled for October 12 and Alonzo Saunders' for October 13 (T. 973; Petitioners' Ex. Nos. 3 and 10). Both appeared on their assigned dates and their attorneys accompanied them into the hearings (T. 961, 989, 990).

Throughout this entire period and for a full week prior to the October 14 homecoming football game, there were student demonstrations on the campus (T. 476, 482). These demonstrations included marches through classrooms which were in session (T. 476, 654, 655) and through the halls where classes were being conducted (T. 480, 656). The demonstrations created a tension and were interfering with classes (T. 1044), and there was a fear of violence from the demonstrations by other students (T. 994). The situation was such that the only three white residents of the girls' dormitory moved out (T. 185).

It was also during this period that Alonzo Saunders, a leader in the student rights movement, planned and organized a protest demonstration to be held on October 14, 1967, during the homecoming football game between BSC and Livingston College (T. 218, 489). Organizational and planning meetings were held both at Saunders' home and on the campus at BSC (T. 489). Placards denouncing Dr. Hardway, Dean Moore and the college administration were prepared at both Saunders' home and in the student council office at BSC (T. 491, 492).

On October 14, the student demonstrators met on campus in front of the girls' dormitory where they boarded buses, which were provided by either the student council or college, and were transported to the football stadium (T. 492). Upon arriving at the stadium, the students seated themselves in the student section, where they remained until half-time (T. 488, 489, 675). Just prior to half-time, approximately one hundred student demonstrators, many of whom carried placards bearing slogans such as "Protests",

"Hardway is a puppet, and Spangler pulls the strings", "Niggers ain't so bad", "Administration, who really started the fire", "Rights now", and "Hardway, we want no Moore Moore", assembled on the walkway in front of the bleachers [T. 675, Petitioners' Exs. 8 (a) through 8 (i)]. Each of the petitioners in this action carried a placard bearing one of the aforesaid slogans (T. 519). At half-time the students moved to the north end of the playing field and began the "protest demonstration" (T. 498, 499, 675). The demonstrating students, including all of the petitioners, marched down the field to the south thirty-yard line and faced the west bleachers, in which Dr. Hardway, his guests, Dean Moore, her husband, and other spectators were seated (T. 498, 499, 676). The demonstrators remained in front of the bleachers, displaying their placards and chanting slogans similar to those printed on the placards, for ten to fifteen minutes, and then returned to the bleachers (T. 499, 676). Admittedly, the actions of the student demonstrators up to this point, while perhaps not in good taste, were peaceful and non-violent.

Upon returning to the bleachers and after the football game had resumed, the student demonstrators, as planned, continued to demonstrate (T. 517). One hundred fifty to two hundred of the demonstrating students marched to a section of the "home" bleachers which was occupied by members of a white fraternity who were attending the game as a group and there continued to demonstrate for ten to fifteen minutes by chanting and waving their placards, blocking the fraternity group's view of the game and urging them to join in the demonstration (T. 499, 676, 924). When the fraternity group did not join in the activities, the

demonstrating students entered the section of the bleachers occupied by Dr. Hardway, Mrs. Hardway, Mrs. Hardway's mother and father, Dean Moore, Mr. Moore, other BSC staff members and spectators (T. 354, 783). They surrounded the Hardway party and continued to demonstrate. The students were chanting, singing and yelling at Dr. Hardway. Placards were held in front of the Hardway party deliberately obscuring their view of the game (T. 786). Albert Smith jumped directly in front of Dr. Hardway, yelled at him and held a placard bearing the slogan "Niggers ain't so bad" within several inches of Hardway's face. Dr. Hardway attempted to lean to the side so as to be able to see the game several times, but Smith followed with his placard (T. 354, 519, 687, 725). The students pressed closer and closer to the victims and their conduct became more harassing and menacing (T. 354, 677, 692). Several of the spectators sitting in the section felt compelled to leave (T. 354, 893, 1050). Dean Moore and her husband left because she was afraid and overwhelmed (T. 1050). After some ten to fifteen minutes, the police, observing that Dr. Hardway's guests were showing concern and because in their opinion a riotous situation was developing, deemed it expedient to escort Dr. Hardway and his guests from the game (T. 499, 500, 677, 692, 705, 725, 726, 783).

As Hardway and his guests were being escorted from the stadium some of the police officers unsuccessfully attempted to form a line and restrain the students who were surging after Dr. Hardway in a threatening manner to prevent them from reaching him (T. 677, 728). Albert Smith shouted "We'll get you Hardway" (T. 355, 368). Another demonstrator

spat into the face of Bluefield police officer Burnham (T. 678).

Upon reaching the stadium exit, Dr. Hardway and his father-in-law, after conferring with the police, decided to remain at the game, but to sit on the opposite side of the field, which was virtually unoccupied (T. 678). Mrs. Hardway and her mother, however, left the game. The police escorted Dr. Hardway and his guest to the opposite side and seated them about two or three rows up on the fifty-yard line. The police then formed a defensive perimeter around them, blocking the two entrances into the section in which they were seated (T. 678). The students followed Dr. Hardway to the opposite side and continued in their menacing conduct. They attempted to enter the stands and attack Hardway, but were prevented by the police from doing so (T. 679). Alonzo Saunders, who was identified by several persons either because they knew him or by reason of his attire, appeared to be the leader and he was urging the demonstrators to crash the police lines (T. 289, 346, 356, 366, 685, 716, 892). Shouts of "Put the girls up front, they [the police] won't hit them" were heard (T. 346, 766). The girls went to the front and were blocked by the police. Trooper Shade was repeatedly asked by one of the girls if he would hit a girl (T. 730).

The pushing, shoving and yelling continued. The language used by the students became vulgar and profane (T. 357, 731). Allen Barker was in the center of the group, and was pushing and urging the demonstrators to crash the police lines (T. 357, 360); Donald Hill was a participant in the actions of the demonstrators (T. 361); Thomas (T. J.) Malone was

locked arm-in-arm with two others and was urging the crowd to crash the police line and appeared to be intoxicated (T. 357, 360, 362, 685); Terry Miller was in the front line and appeared to be one of the leaders (T. 357, 685, 737); Charles Newbold remained in the front lines and was seen to shake his fist at Hardway and yell "We'll see you tonight Hardway" (T. 356, 357, 364, 737); Sharon Smith and Carmen Pilgrim were in the front ranks and made physical contact with the police (T. 357, 360, 365, 369, 736, 712); Albert Smith was active in the pushing, shoving and urging to crash the police line and in the parking lot melee (T. 360, 367, 742).

The demonstration continued throughout the entire second half of the football game. A few minutes before the game ended the student demonstrators entered the stands through sections not guarded by the police and surged toward Dr. Hardway (T. 680). The police were forced to take Hardway out (T. 730). They formed a protective circle around him and escorted Hardway and his father-in-law to the parking lot (T. 358). The students attempted to break the police circle (T. 680, 729). One demonstrator attempted to reach over Officer Dent's shoulder and either grab or strike Hardway (T. 680). Rocks and bottles were thrown at the police and Hardway by the demonstrators (T. 358, 681, 731). They shouted profanities and obscenities at both the police and Hardway (T. 358).

Upon reaching the parking lot, Hardway and his father-in-law got into his automobile, but before they could leave, one of the demonstrators jerked the door open. Hardway was able to pull it closed again and

locked it (T. 358). Another demonstrator attempted to prevent Hardway from driving away by bringing his car to a halt in front of him. The police had to make him move (T. 731, 732, 785). Other demonstrators crowded around Hardway's car and began to shake it and beat on it (T. 358, 731, 681, 800). The police were finally able to shove the demonstrators away and get Dr. Hardway on his way (T. 358, 681). During the disturbance on the parking lot, Officer Dent was struck in the face by a stone (T. 683); another demonstrator struck Sergeant Lee of the Bluefield Police Department in the face with his fist while attempting to take the officer's riot stick from him (T. 733). Trooper Shade was struck on the ankle by a rock and another trooper was struck by one of the demonstrators, a rather large man; Trooper Shade had to use his chemical mace on him (T. 733). Trooper Shade felt that his life was in danger (T. 757).

After Hardway's departure, the demonstrators attempted to separate the police officers and the officers were forced to take defensive action; this they did by forming two lines, one behind the other, back to back (T. 683, 684). There was sufficient room at both ends of the police line for the people to go around, had they wanted, but the demonstrators continued to attempt to break through the police line (T. 683, 684). At the first opportune moment, while being verbally and physically abused, the officers backed out of the parking lot and into the stadium, where their automobiles were parked (T. 735, 683, 684).

Both Trooper Shade and Officer Dent identified Terry Miller as one of the participants in the melee on the parking lot (T. 685, 686, 740, 746, 747).

Sergeant N. W. Dalton of the Bluefield Police received a radio call to go to the stadium parking lot to render assistance because of a disturbance there (T. 805). Upon arriving he saw Terry Miller, whom he had known since birth, in a very intoxicated condition and in a very belligerent mood [T. 739, 806, 807 (a), 807 (b)]. Miller told Dalton that his friend had been arrested and that he was going to take him from the police (T. 807 (a), 811). Miller had told others that a girl had been struck by a police officer (T. 748). Sergeant Dalton was finally able to get Miller under control and he turned him over to his (Miller's) brother-in-law (T. 809, 814). Several of the demonstrators threatened to overturn Sergeant Dalton's police car, but he was able to dissuade them (T. 814).

The police officers who were at the October 14, 1967, football game made no arrests because they did not have sufficient manpower or equipment to handle the situation (T. 691, 757).

About midnight Sunday night, October 15, 1967, Allen Tucker led approximately one hundred fifty students to Dr. Hardway's home and led a "serenade" on the lawn in front of the house. The "songs" were the same chants that had been used during the demonstration at the football game the day before (T. 370, 371).

On Monday, October 16, 1967, Dr. Hardway called a meeting of the administrative council and discussed the two demonstrations with them (T. 1075). Dr. Hardway was able to personally and positively identify nine of the students who had participated in the

demonstration after half-time that had become riotous and one person, Allen Tucker, who participated in the serenade. He directed Dean Moore to contact the two women students and Dean Turner to contact the eight men students and ask them to come to his office (T. 855, 1046). Neither Carmen Pilgrim nor Sharon Smith were in their scheduled classes or at their places of residence, and Dean Moore was unable to contact them (T. 1046). Dean Turner was unable to locate any of the eight men students in their regularly scheduled classes (T. 855-857). However, Dean Turner did find Allen Barker, Charles Newbold, Thomas Malone and Allen Tucker participating in a demonstration in front of Conley Hall, the Administration Building (T. 856). Dean Turner personally requested each of them to go to Dr. Hardway's office (T. 857). None honored the request.

Only after having made several diligent attempts to contact the ten students to have them come to his office and having failed in these efforts did President Hardway suspend the ten students, and send notices of the suspensions to them. Telegraphed notices of the suspensions were sent to their parents (T. 857, 1046).

The notices advised the ten students that they were suspended immediately, why they were being suspended, that they had the right to appeal their suspension, and how to proceed (Petitioners' Ex. Nos. 9, 24; Respondents' Ex. No. 3). All requested hearings before the Faculty Committee on Student Affairs (Petitioners' Ex. No. 25; Respondents' Ex. No. 2). Notices were mailed to each of the ten students formally setting forth the specific charges, the procedures to be followed and the dates set for the hearings.

Six of the ten suspended students appeared before the Faculty Committee on Student Affairs and demanded that they be permitted to be represented by an attorney. Upon being advised that they could not be represented by an attorney, each read a prepared statement and declined to continue with the hearing. (Petitioners' Ex. No. 15.) The remaining four students appeared before the Committee and had hearings. The Committee recommended that Allen Tucker and Donald Hill be reinstated and that the suspension of Allen Barker and Albert Smith remain in effect. (Petitioners' Ex. Nos. 11-14, 16-19.)

Notwithstanding that Thomas Malone, Terry Miller, Charles Newbold, Carmen Pilgrim, Alonzo Saunders, and Sharon Smith had refused to participate in a hearing before the Faculty Committee on Student Affairs, the Committee continued to make itself available to them for a hearing. (Respondents' Ex. Nos. 4 and 5.) Each of the six suspended students requested a hearing three times and then failed to appear on the hearing dates for hearing.

Thereafter, on October 26, 1967, the petitioners filed a verified complaint for preliminary and permanent injunctions seeking, *inter alia*, to enjoin the respondents from continuing to enforce the suspension of petitioners as students of Bluefield State College. Jurisdiction was purportedly invoked by virtue of Title 28, U. S. C. §§ 1331 and 1343, Title 42, U. S. C. §§ 1981, 1983 and 1985 (3), and the First, Fifth and Fourteenth Amendments to the United States Constitution. An evidentiary hearing commenced on January 2, 1968, and was concluded on January 12, 1968. The District Court deferred its decision pending prep-

aration of the transcript and submission of briefs and on April 10, 1968, in accordance with comprehensive and exhaustive findings and conclusions, dismissed the petitioners' complaint and cause of action (283 F. Supp. 228; Petitioners' Appendix, p. 3a).

ARGUMENT

Whether the First and Fourteenth Amendments to the United States Constitution restrict or preclude officials at a state-supported institution of higher learning from initiating and conducting disciplinary proceedings against students who violate institutional rules and regulations by engaging in riotous and disruptive conduct which endangers the life, property, administration and well-being of the institutional community by any disciplinary procedure other than a formal trial type procedure.

After reviewing the 1126-page transcript of the evidence and examining 55 exhibits, the district court, in an opinion containing comprehensive findings of fact and conclusions of law, dismissed petitioners' cause of action for lack of jurisdiction. Somewhat parenthetically, the Court also noted that it was rather clear the real issue involved did not stem from a denial of legitimate constitutional rights but was, in fact, a conflict between certain students and the college administrators "for supremacy in the field of school policy and school administration."[1] This conclusion is and was inescapable in view of the evidence of violence and disruptive activities that pervaded the campus community at BSC from the very outset of the 1967-68 term.

Notwithstanding, petitioners continue to pursue the elusive theories that they either had the right to do what they did with impunity and/or that they were

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[1]283 F. Supp. at 239.

entitled to a full-dress trial for their allegedly "criminal" behavior if caught; however, the invariable factor involved is that the evidence has conclusively established their involvement.[2] This resolution had to be made at the trial court level inasmuch as the evidence adduced herein relative to the activities of the petitioners at the ball game would tend to make the objective reader question the actual presence of the witness.[3] Of necessity, in the instant case, it was incumbent upon the district court to apply the accepted credibility tests and to evaluate the conflicting testimony in reaching its decision. *Post* v. *Boles*, 332 F. 2d 738 (4th Cir., 1964). Unless the petitioners could demonstrate that the district court's findings were clearly erroneous, the Court of Appeals was, of course, bound thereby. *Vanater* v. *Boles*, 377 F. 2d 898 (4th Cir., 1967); *Los Angeles Shipbuilding & Drydock Corp.* v. *United States*, 289 F. 2d 222 (9th Cir., 1961).

Obviously, it becomes imperative that petitioners' attack be focused upon Dr. Hardway and his account of the affair.[4] This approach, however, completely disregards the evidence of the corroborating witnesses who testified at the trial. There is no question that

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[2]It is interesting to note that petitioners have again ostensibly abandoned their broad claim of discrimination even though originally placing great reliance thereon for jurisdiction purposes as well as asserting it as the reason for the student unrest at BSC (Complaint, para. I; Petitioners' Brief, p. 7).

[3]The petitioners' witness Meadows would have the Court believe that the "children" were acting as "cheer-leaders" even though he characterized the activities as a "melee" (T. 1106, 1107).

[4]Dr. Hardway was the main target of the "student protest movement" inasmuch as it became quite obvious in the trial that his positive innovations were resisted by some faculty members and students at BSC (T. 469, 470, 882).

the petitioners' activity at the ball game caused the police to become concerned not only for Dr. Hardway's welfare but for their own (T. 757). In any event the petitioners are and were unable to impeach or discredit the evidence of the casual, disinterested witness' account of the episode.[5] It is also obvious that other spectators close to the "demonstration" surrounding Dr. Hardway either became offended or sufficiently concerned to compel them to move from the area. It is under these established circumstances that the defendants proceed.

As in all cases involving the question of what is or what is not due process, no hard and fast rule can be laid down. *Hannah* v. *Larche*, 363 U.S. 420 (1960); *United States ex rel. Drew* v. *Myers*, 327 F. 2d 174, 182 (3d Cir., 1964). It varies widely with the circumstances, *Jones* v. *Rivers*, 338 F. 2d 862, 874 (4th Cir., 1964), and thus, the search for a violation of the Fourteenth Amendment and its constitutional concept of due process must be an appraisal of all the circumstances in the differing factual situations. *Cafeteria & Restaurant Workers' Union, Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886 (1961); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); *United States ex rel. Martin* v. *Murphy*, 208 F. Supp. 562 (N.D. N. Y., 1962). These general principles find peculiar application in the instant case.[6]

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[5]Mr. Kersey observed the shoving and pushing as Dr. Hardway and his party were escorted out of the stands on the "home" side as well as on the "away" side (e.g., T. 783).

[6]It is, of course, necessary to examine the circumstances and atmosphere that prevailed upon the campus of BSC at the time of and prior to petitioners' suspension (e.g., T. 185, 476, 480, 482, 654, 655, 656, 994, 1044).

Dixon v. *Alabama State Board of Education*, 294 F. 2d 150 (5th Cir., 1961), cert. denied, 368 U.S. 930 (1961), was the first significant case in which the federal "due process" provisions were applied to student disciplinary proceedings. The Court, at page 155, observed that the procedural requirements necessary to satisfy due process depended upon the circumstances and the interest of the parties involved and concluded that:

> " 'Whether the ex parte procedure to which the petitioners were subjected duly observed "the rudiments of fair play", * * * cannot * * * be tested by mere generalities or sentiments abstractly appealing. *The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.*' " (Emphasis supplied.)

Significantly, there was no violence involved in the *Dixon* case and, in fact, the Court noted that the misconduct for which the students were expelled had never been definitely specified. The evidence therein did not affirmatively show that all of the plaintiffs were jointly present at more than one of the several demonstrations—a sit-in at a lunch grill. Moreover, the State Board held an *ex parte* hearing and directed the college president to write letters of dismissal to the students even though he was not aware of the reasons therefor.

Thereafter, in *Knight* v. *State Board of Education*, 200 F. Supp. 174 (M.D. Tenn., 1961), thirteen students of Tennessee A & I University were suspended without notice or hearing by the University disciplinary committee after the students had allegedly been convicted on charges of disorderly conduct and while in jail in Mississippi. The disciplinary committee acted pursuant to a "mandatory dismissal" regulation of the State Board directed at any student convicted of a criminal offense involving personal misconduct. The students did not learn of the action until their return to Tennessee, some thirty or forty days later. The Court noted that the committee relied upon hearsay information which later proved to be false.[7] However, the Court observed that notice and hearing are not always required with respect to a student's actual conduct and, at page 179 of the opinion, stated:

> "* * * It may be conceded that a state college or university must necessarily possess a very wide latitude in disciplining its students and that this power should not be encumbered with restrictions which would embarrass the institution in maintaining good order and discipline among members of the student body and a proper relationship between the students and the school itself. *It may be further conceded that it is a delicate matter for a court to interfere with the internal affairs and operations of a college or university, whether private or public, and that such interference should not occur in the absence of the most compelling reasons.*" (Emphasis supplied.)

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[7]The committee's information was that plaintiffs had been convicted of breach of the peace; however, they were actually convicted of disorderly conduct.

In *Due* v. *Florida A & M University*, 233 F.Supp. 396 (N.D. Fla., 1963), plaintiffs were dismissed after having been found guilty of contempt of court. Shortly after their conviction, the students were telephoned by the dean and asked if they had received a letter calling for their appearance before the disciplinary committee. Each replied in the negative and returned to the campus to appear before the committee. The chairman read the letter containing the charges to each student; the committee questioned each student concerning the conviction and then gave the student the opportunity to respond. Following their dismissal, the students brought suit alleging that the notice and hearing were unfair and a denial of due process. The Court, using the criteria laid down in *Dixon*, *supra*, upheld the procedures of the university.

In the instant case, it is of particular significance that, prior to Dr. Hardway's appointment in June, 1966, there were no fixed, codified disciplinary procedures at Bluefield State College. Sometime during the 1966-67 school term, S. E. Cary, Coordinator and Director of Guidance, was assigned to prepare a student handbook and to formulate a disciplinary procedure to be used at Bluefield State College. (Petitioners' Exhibit B, pp. 22, 23 and Appendix, page 26a.) Thereafter, during the summer of 1966, the handbook was completed and sent to the printer. The printed copies were returned to Bluefield State College during the first week of October and were immediately distributed. It is therefore logical to assume that the petitioners were aware of the contents of the manual prior to October 14, 1967.

The petitioners' conduct at the Bluefield State College-Livingston game on October 14 has been set forth in some detail in the Statement of the Case, *supra*, and will not be re-examined here except in limited areas. However, it is of sufficient importance to reiterate that Dr. Hardway identified each and every petitioner and testified as to their individual participation in the melee that occurred subsequent to the half-time demonstration (T. 354-372). This evidence was corroborated in part by the testimony of one of the petitioners herein.[8]

On Monday, October 16, Dr. Hardway called a meeting of the Administrative Council to discuss the incident at Mitchell Stadium on October 14. He directed Dean Moore to contact the two female petitioners and Dean Turner to contact the seven male petitioners whom he had identified as participants in the melee and to request them to come to his office. Deans Moore and Turner were unable to locate any of the petitioners in either their scheduled classes or at their places of residence. However, Dean Turner found four of the petitioners participating in a demonstration in front of the Administration Building and requested that they go to Dr. Hardway's office. They refused to go.

Thereafter, Dr. Hardway mailed the notices of suspension to the petitioners based upon their riotous activities and advised them of their right to appeal to the Committee on Student Affairs. Although hearings were requested and made available on different occasions, only four of the petitioners availed them-

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[8]Carmen Pilgrim testified as to petitioner Saunders' particular involvement as well as to the presence of all the petitioners on the "away" side. (T. 489, 510, 517-520.)

selves thereof. Of the four, two of the original ten suspended students were reinstated by Dr. Hardway upon the recommendation of the Committee.

A recent case involving an analogous factual situation is *Wright* v. *Texas Southern University*, 277 F. Supp. 110 (S.D. Tex., 1967). In that case eight students alleged that they were being denied admission to the University because they were suspended at the end of the Spring term for their participation in several peaceable assemblies.[9] They further alleged that their suspension was violative of due process because they were not given notice and some opportunity for a hearing on the grounds for their suspension.

The Dean charged with the responsibility of administering student discipline at the university personally observed one of the plaintiffs, Wright, on the campus during a period of serious unrest and turbulence on the campus.[10] He requested the plaintiff and his companion to leave, but they refused to do so. He asked Wright to come to his office to talk with him about the incident but Wright never came. Later, the Dean made attempts to contact Wright by mail but could find no mailing address. Further inquiry as to Wright's address was to no avail and he withdrew from the University on May 2. Thereafter, he was

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[9]277 F. Supp. at 111. The evidence adduced at the hearing showed five of the plaintiffs to be scholastically ineligible for admission for the Fall term. Therefore, their claims were rejected as presenting no substantial federal question. The Court emphasized that no student has a constitutional right to remain in attendance at a public university irrespective of his academic performance.

[10]A previous violation of University regulations by Wright had been reported to the Dean in March.

notified by certified mail that he would not be permitted to re-enter the University.

The plaintiff Richards was also personally observed by the Dean exhorting students to block the entrance-way to a campus building so as to prevent entry by the faculty and students. A letter was sent to Richards asking that he report to the Dean but it was returned undelivered. Richards was notified after the close of the Spring term that he would not be permitted to re-enter the University.

The Court acknowledged that *Dixon* v. *Alabama State Board of Education, supra,* was the applicable law for that Circuit but did not find it squarely in point on the issues regarding notice and hearing as they were raised in the *Wright* case. The Court further acknowledged that the application of the notice and hearing requirement to colleges presented somewhat of a theoretical dilemma when the official in charge of student discipline was a witness to the students' misconduct. However, the Court was of the opinion that the official was not disqualified from making the determination of what disciplinary action was to be taken.[11]

The Court, in granting the defendants' motion to dismiss, at page 113, concluded:

> "I think this evidence clearly demonstrates that diligence was exercised in attempting to

[11]277 F. Supp. at 112, footnotes 1 and 2. The Court was also of the opinion that the procedure of summoning the student to the office, demanding an explanation, and deciding whether he was to be disciplined, in the context of the campus, was a procedure consistent with due process.

give proper notice to both Wright and Richards. Wright was given personal notice at a time when he was in the act of violating a valid University regulation. Certainly that situation itself should have impressed him with the necessity of compliance with the Dean's command to visit his office. Moreover, written communications were sought to be delivered to both Wright and Richards. Only because of their failure to comply with a valid University regulation was delivery of the communications unsuccessful. The Dean of Students, I am convinced, exercised his best efforts to inform these two students of the nature of the University's complaints against them. *I do not think more is required.* To now order defendants to reinstate these plaintiffs subject to holding a hearing on their grounds for suspension would, it seems to me, be tantamount to condoning the irresponsible attitude exhibited by these plaintiffs. It would be unreasonable indeed for this Court to hold that a University could not take disciplinary action against students who could not be contacted although diligent attempts were made, particularly where their whereabouts were not disclosed to the University in violation of a valid regulation. In a day where the population of some of our state colleges and universities now approaches that of small cities, where there is a decided increase in off-campus residency, and where there are in many instances no attendance rules imposed on the students, to require more of university officials than was done here, would in many cases render university officials 'powerless to command or rebuke the fanatic, the irritant, the malingerer, the rabble rouser.' (Court's emphasis.)

* * *

> "In conclusion, with respect to the activities of each of these students, as presented to this Court, the constitutional umbrella should afford no protection to those who choose to go out in the rain bareheaded."

Significantly, the *Dixon* Court, in affirming the *Wright* case on appeal, *Wright* v. *Texas Southern University*, 392 F. 2d 728 (5th Cir., 1968), practically adopted the district court's findings and conclusions *in toto* and ostensibly reappraised its earlier holding by noting that:

> "In Dixon v. Alabama, 5 Cir., 1961, 294 F. 2d 150, this Court held that in matters of disciplinary action a student attending a tax supported institution of higher learning is entitled to notice that he is charged with misconduct, including a statement of the charges alleged in justification of anticipated action against him. Moreover, the student must be given the names of the witnesses against him and must be informed of the nature of their proposed testimony. Lastly, he should be given *the opportunity* to present his defense, orally or in writing, after which the findings of the disciplinary body should be presented in a report available for his inspection. (Emphasis theirs.)
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> "This does not mean that the student is entitled to the formality of a trial, in the usual sense of that term, but simply requires that he must be given a fair and reasonable opportunity to make his defense to the charges and to receive such a hearing as meets the requirements of justice, *both to the school and to himself.* In short, the student at the tax supported institution cannot be arbitrarily disciplined without the benefit of the ordinary, well recognized principles of fair play. (Emphasis ours.)

> "It is equally well settled, we think, that by seeking admission to and obtaining the benefits of attending a college or university the student agrees that he will abide by and obey the rules and regulations promulgated for the orderly operation of that institution and for the effectuation of its purposes, State ex rel. Sherman v. Hyman, 180 Tenn. 99, 171 S. W. 2d 822 (1942); Cornette v. Aldridge, 408 S.W. 2d 935 (Tex. Civ. App., 1966, er-for ref. n. r. e.)."

In *Jones* v. *State Board of Education of and for the State of Tennessee*, 279 F. Supp. 190 (N.D. Tenn., 1968), 70 students were notified by telegram and letter of their indefinite suspension and granted an opportunity for a hearing at a later date. The suspensions were predicated, *inter alia*, upon disturbances in the school cafeteria, arrest for off-campus disorderly conduct, disrespect for school authority, continual disruption of fellow students, abusive language to faculty and administration and participation in riots. Some of the disciplined students alleged violations of their rights of free speech, assembly and procedural due process. The Court reviewed the case on the basis of the facts in relation to the disciplinary procedure utilized by the university and, at page 202, observed:

> "* * * Disciplinary proceedings conducted by an educational institution are not to be tested according to the niceties of procedure required in a court of law. Inquiry into the technicalities governing burden of proof in civil or criminal trials is, therefore, irrelevant. This phase of the plaintiffs' argument resolves itself basically into an unfounded argument of semantics brought about by the use of the word 'readmit' by the F.A.C. In an administrative proceeding the 'demands of due process do not require a

> hearing, at the initial stage or at any particular point or at more than one point * * * so long as the requisite hearing is held before the final order becomes effective.' Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-153, 61 S.Ct. 524, 536, 85 L.Ed. 624 (1941). In this case the requisite hearing was held before the final decision of indefinite suspension was made."

Balancing the interests involved, the Court, at page 205, concluded:

> "* * * While a state school must comply with these elementary principles of procedural fair play, it is not necessary that a university adopt all of the formalities of a court of law. To achieve its educational goals a university must maintain order, propriety, and discipline. It is axiomatic that the exigencies of university life require the formulation and enforcement of rules of student conduct, and a court of law will not interfere with this function when, as in this case, the university has proceeded in a manner that is fundamentally fair and reasonable."

See also, *Zanders* v. *Louisiana State Board of Education*, 281 F. Supp. 747 (W.D. La., 1968).

The *Jones* case, it is submitted, is virtually indistinguishable from the instant case and the logic applied therein reveals the Court's keen awareness that "due process" should not and cannot be equated with "judicial process"; to hold that prior notice and hearing as applied to one case is applicable to every case is to stagnate the due process clause. This, fortunately, is the approach the federal judiciary generally has followed and reveals the fallacy of petitioners' contention that a divergence of opinion prevails among the Circuits.

The record in the instant case is replete with the petitioners' refusal to cooperate, their rudeness, contempt of administrative policies and procedures as well as of the efforts manifested by the administration to communicate.[12] This attitude materialized into riotous conduct on October 14 at Mitchell Stadium. Notwithstanding the clear evidence of their gross misconduct at the football game, the petitioners continue to indulge themselves in the delusion that such conduct is protected by the First Amendment and the "chilling effect" any inhibition thereof would have upon the right of free speech. However, one who claims that this right has been abridged must show that he had a right to use the particular medium through which he seeks to speak. *Avins* v. *Rutgers, University of New Jersey*, 385 8F. 2d 151 (3d Cir., 1967).[13]

In *Buttny* v. *Smiley*, 281 F. Supp. 280 (D. Colo. 1968), several students were suspended for blocking an entranceway to a C.I.A. recruiter who was visiting the campus for employment interviews. The plaintiffs also contended there that the action of the University officials had a "chilling" effect on the First Amendment right of freedom of speech. The Court responded:

> "* * * What they said on the occasion in question is not the basis for the disciplinary proceedings; it is what they did. We hold that the First

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[12]T. 328, 963, 964, 966, 1018, 1020, 1066, 1071; Respondents' Exhibits Numbers 12 and 13.

[13]Id. at 153. "* * * True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum * * *."

> Amendment guarantee of freedom of speech, as it is related to plaintiffs' activities here, does not give them the right to prevent lawful access to campus facilities. We have been unable to find any case that holds that active, aggressive physical action may properly be characterized by the courts as free speech."

In *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535 (S.D. N.Y., 1968), the plaintiffs invoked injunctive relief complaining, *inter alia*, against the "policy-making structure of the University," and the President's "unlimited and undefined" disciplinary powers. Plaintiffs therein also alleged the peacefulness of their demonstrations and asserted the "chilling effect" that defendants' disciplinary proceedings would have upon their constitutional rights. In an effort to cope with the disturbances resulting from the "sit-ins", President Kirk appointed a Committee on Disciplinary Affairs which, *inter alia*, formulated a rule that any student failing to appear before his dean for an initial determination of involvement should be suspended. Accordingly, plaintiffs were notified but did not comply. Instead, they asserted through counsel that the dean was acting illegally and proceeded to occupy a university building in another sit-in. Plaintiffs refused to appear in person and would only appear through their counsel and were thus suspended. The district court, in denying the injunction, observed:

> "Our highest Court has made clear in the labors of a long generation that the First Amendment's mandate protecting free expression 'must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.' *Bridges* v. *California*, 314 U. S. 252, 263 (1941). The

Court has insisted steadily on the 'principle that debate on public issues should be uninhibited, robust, and wide-open * * *.' *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). It has also made clear, however, the gross error of believing that every kind of conduct (however nonverbal and physically destructive or obstructive) must be treated simply as protected 'speech' because those engaged in it intend to express some view or position. E.g., *United States* v. *O'Brien*, ... U. S. ..... (1968); *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 498 (1949); cf. *People* v. *Stover*, 12 N. Y. 2d 462, 240 N.Y.S. 2d 734, *appeal dismissed*, 375 U. S. 42 (1963). Similarly, the Court has rejected the notion that 'everyone with opinions or beliefs to express may do so at any time and at any place.' *Cox* v. *Louisiana*, 379 U. S. 559, 574 (1965); *Adderley* v. *Florida*, 385 U. S. 39 (1966). Without such inescapably necessary limits, the First Amendment would be a self-destroying license for 'peaceful' 'expression' by the seizure of streets, buildings and offices by mobs, large or small, driven by motives (and toward objectives), that different viewers might deem 'good or bad,' *Cox* v. *Louisiana*, *supra*, at 567. * * *

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"5. Having undertaken to thwart and obstruct the disciplinary proceedings in their inception, plaintiffs now pick their way through the procedures outlined by the Joint Committee on Disciplinary Affairs and contend that these deny procedural due process. The argument lacks merit for reasons which can be stated briefly:

"(a) Viewed generally, in advance of any specific problems that might arise in specific cases, the prescribed procedures, sufficiently

> sketched above, seem entirely fair and amply protective of student rights. They are not required, obviously, to duplicate the criminal trial process. Bearing in mind that the process which is 'due' may vary with the nature of the subject and the occasion, *Wright* v. *Texas Southern University*, 392 F. 2d 728, 729 (5th Cir. 1968); *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150, 155-56 (5th Cir.), *cert. denied*, 368 U. S. 930 (1961); *Wasson* v. *Trowbridge*, 382 F. 2d 807, 811-12 (2d Cir. 1967); *Barker* v. *Hardway*, 283 F. Supp. 228, 236-37 (S.D. W. Va. 1968); *Buttny* v. *Smiley*, 281 F. Supp. 280, 288-89 (D. Colo. 1968), the court perceives no valid basis whatever for the abstract criticisms plaintiffs tender."

The notion that the First and Fourteenth Amendments afford the same protection to "conduct" as it does to "pure speech" has been vigorously and forthrightly rejected by this Court in recent cases e.g., *Adderley* v. *Florida*, 385 U. S. 39 (1966). Moreover, this Court has specifically stated that protests in the form of mass demonstrations and the like give rise to legitimate state concern in order to prevent public disorder and violence. *Walker* v. *Birmingham*, 388 U. S. 307 (1967).

Admittedly, the pivotal point in *Walker* was the violation of an injunction; however, this Court acknowledged the duty and authority of proper officials to act in order to prevent violence and disorder. As applied to the instant case, in view of the previous violence and disruptive activities occurring at the College from the beginning of the September term, it was logical to assume that campus conditions would further de-

teriorate upon class resumption.[14] Thus, notwithstanding that the petitioners' conduct at the football game was, in and of itself, sufficient basis for the discipline in the instant case, under these circumstances, it also became the duty of the College officials to consider the safety of the students as a communal group as well as the protection of the property committed to their charge. In this regard, school officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the courts. *Tinkler* v. *Des Moines Independent Community School District*, 258 F. Supp. 971 (S.D. Iowa, 1966), affirmed 383 F. 2d 988 (8th Cir., 1967), cert. granted, 390 U. S. 942 (1968). Unless officials have authority to keep order, they have no power to guarantee education, *Hammond* v. *South Carolina State College*, 272 F. Supp. 947 (D.S.C., 1967),[15] and it cannot be denied that these officials have an inherent general power to maintain order on campus and exclude those who are detrimental to its well-being. *Buttny* v. *Smiley, supra; Goldberg* v. *Regents of University of California*, 57 Cal. Rptr. 463, 473 (1967). Moreover, even the public character of BSC did not grant the plaintiffs a license to engage in activities

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[14]This materialized into the Sunday night, October 15, "sing-in" on the lawn of Dr. Hardway's home until the early hours of the morning and the Monday, October 16, disruptive mass demonstration on campus (T. 370, 371).

[15]*Id* at 949. "* * * To be sure, this is a tax supported institution, but this does not give license to chaos, or the hope to create chaos. The majority of the taxpayers who established, through representative government, the institution, and all the taxpayers who support this institution, have a vested interest in a peaceful campus, an academic climate of order and culture. * * *"

which disrupted the facilities or which interfered with the rights of other students to pursue their particular goals.[16]

Although *Dixon* v. *Alabama State Board of Education, supra,* required notice and hearing, the Court noted that the "nature of the hearing should vary, depending upon the circumstances of the particular case,"[17] and need not be a full-dress judicial hearing. As can be observed from the *Dixon* decision, the Court did not expressly require that the students be permitted the presence of legal counsel at their hearing. This approach is in accord with the weight of authority on the nature and extent of student disciplinary hearings. *State ex rel. Sherman* v. *Hyman,* 180 Tenn. 99, 171 S. W. 2d 822 (1942), cert. denied, 319 U. S. 748 (1943); Annotation: 58 A.L.R. 2d, *Student-Discipline-Rights to Hearing,* 903, 906-7 (1958).

This concept is reinforced by *Knight* v. *State Board of Education, supra,* in which the rule enunciated in

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[16]"I know of no legal principle which protects students on campus from the consequences of activities which would be violations of law if undertaken elsewhere. This is the law, but we are now confronted with a problem which is not solved by mechanical application of the criminal law: the problem of readjusting campus life to the new attitudes and demands, and of coping with the disaffections which afflict so many students.

"Here again, perhaps it is a beginning to separate student activities which are nonviolent from those which involve assault or damage to persons or property. Where the law violation is nonviolent or technical (such as blocking entrance to a campus building, or even orderly occupancy of a university facility), there may be sense in patient forbearance despite the wrong that the action involves. But violent activities, in my judgment, should be regarded and treated as intolerable. * * *" Fortas, *Concerning Dissent and Civil Disobedience,* p. 92 (Signet, 1968).

[17]294 F. 2d at 158.

the *Dixon* case was adopted and applied. However, as noted earlier, the Court in *Knight* was quick to point out that the right to notice and hearing depended upon the exigencies of the particular controversy and that, in some instances, a prompt dismissal without notice or hearing was necessary in order to protect the college from dishonor and discredit as where the student had been convicted in a court of law of serious misconduct. If, according to *Knight*, in some instances the student has no right to notice and hearing before dismissal, it defies logic to infer that the student has an absolute right to legal counsel when a hearing is afforded. Further, the theoretical extension of "due process" propounded by petitioners would turn every disciplinary proceeding into a full-scale criminal trial.

There are other recent decisions which, although they require a hearing and notice of charges in advance before a student's suspension (in the usual case), declare that the hearing need not be of a full-scale judicial nature. *Due* v. *Florida A & M University*, 233 F. Supp. 396 (N.D., Fla., 1963); *Woody* v. *Burns*, 188 So. 2d 56 (D.C. App. Fla., 1966); see also, Comment, 3 Ga. S. Bar J. 101 (1966). The *Due* decision, in analyzing *Dixon* in this regard, observed that:

> "A fair reading of the Dixon case shows that it is not necessary to due process requirements that a full-scale judicial trial be conducted by a university disciplinary committee *with qualified attorneys either present or formally waived* as in a felonious charge under the criminal law." (Emphasis supplied.)

In another recent decision, *Goldberg* v. *Regents of*

University of Cal., 57 Cal. Rptr. 463 (1967), the First District Court of Appeals of California also adopted and applied the *Dixon* rules as to sufficiency and notice of a disciplinary hearing at which students attending a public university were suspended. In that case the Court upheld the suspension as the Court determined that all the mandates of the *Dixon* rules were observed. However, in that case it is noted that it was voluntarily suggested and advised by the University to the students that they might wish to obtain counsel for their suspension hearings although there is no comment in the decision that it was necessary for the disciplinary board to so permit the students the presence of counsel. The Court then analogized attendance by a student at a publicly financed institution of higher learning as being a benefit somewhat akin to that of public employment. If such an analogy is valid, it should be pointed out that in the field of public employment there is no absolute right to presence and representation by counsel at an administrative hearing on the dismissal of a public employee.

In *Suess* v. *Pugh*, 245 F. Supp. 661, 665 (N.D. W. Va., 1965), a case involving the dismissal of a probationary public employee, it was pointed out by the Court that:

> "The right to legal counsel must be found in the Constitution of the United States under the Fifth or Sixth Amendment or by some Act of Congress or some rule or regulation of an agency or administrative tribunal under which the individual functions. The Court is unable to perceive that there is any Constitutional right of counsel in a civil case or in a civil matter pending before an administrative agency. The right

> to counsel under the Sixth Amendment clearly applies to criminal cases only. Under the due process clause of the Fifth Amendment to the Constitution, the Court is unable to find any violations of due process by the denial of counsel in this case."

In accord, *United States* v. *Dicks*, 392 F. 2d 524 (4th Cir., 1968).

As the District Court in the instant case noted, the decisions relative to "right" to counsel are similarly inapplicable to hearings on the dismissal of students for misconduct.[18] This concept has been explored by one legal writer who observed that:

> "* * * Traditionally the determination of whether or not an action constituted a crime has been by reference to the procedure, jurisdiction, and the sanctions which follow, for it is only a crime if made so by law. 'A crime must be defined by reference to the legal consequences of the act' of which the person is accused. A complete exploration of the broad ramifications of this definition is unnecessary. *It is sufficient to say that in a university disciplinary proceeding the procedure followed is not criminal, the jurisdiction is not criminal, and the sanctions imposed are not criminal in nature. There is no holding out of the student to the public as an 'outlaw.'*"[19] (Emphasis supplied.)

See also, *Madera* v. *Board of Education*, 386 F. 2d 807 (2nd Cir., 1967), cert. denied, 390 U. S. 1028 (1968).

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[18]283 F. Supp. at 237.

[19]Johnson, *The Constitutional Rights of College Students*, 42 Texas L. Rev. 344, 349 (1964).

Moreover, misconduct for which a college student can properly be expelled from a college or university need not be of a type which is also considered public misconduct—hence a crime.[20] There is no criminal penalty in the eyes of the law for cheating on exams; disobeying curfew restrictions; or violations of other university-imposed restrictions. Further, suspension from college for misconduct in nowise is a deprivation of the personal freedom of the student. Thus, there is no reasonable analogy to be drawn from cases such as *In re Gault*, 387 U. S. 1 (1967), which involve crimes and deprivations of liberty, to the instant case.

Reliance has also been misplaced upon *Wasson* v. *Trowbridge*, 382 F. 2d 807 (1967), wherein a cadet at the United States Merchant Marine Academy was expelled and instituted suit to stay his expulsion. The

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[20]William G. Cole made the interesting observation that:

"There has been a historic concordat between town and gown, due to which members of a university or college have always enjoyed a certain immunity from the civil authorities. Students apprehended by local police *flagrante delicto* have traditionally not been arrested and brought to trial but rather turned over to the dean for his discretionary discipline. * * * What students are now saying is that they no longer want to be treated so, no longer want the college or university to be *in loco parentis*. They are not, they say, minors but majors and they demand all of the privileges appertaining thereto.

"But this means that they must also accept the responsibilities that accompany the rights. If deans can no longer serve as parent surrogates, if academic administrators must act in all respects like the civil authorities, then there will inevitably be increasing resort to these authorities. To be blunt, the college will 'call the cops'. *Student misdemeanors will no longer be dealt with in camera with wide discretionary powers exercised by the dean but in court with counsel.* Convictions will became a part of the student's permanent and public record, not kept in a confidential dean's file, regarded as youthful pranks to be forgotten and forgiven." (Emphasis supplied.) 54 American Bar Association Journal 159 (Feb. 1968).

Court remanded the case for an evidentiary hearing to determine whether or not the petitioner was denied due process since he alleged the hearing was unfair and that he was not permitted the presence of legal counsel. It is enlightening to note the precise language of the Court in that case:

> "Wasson most strenuously has urged that he was entitled to representation by counsel at one or both of the challenged hearings. We disagree. The requirement of counsel as an ingredient of fairness is a function of all of the other aspects of the hearing. Where the proceeding is non-criminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, where his knowledge of the events of March 30th should enable him to develop the facts adequately through available sources, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel. * * *"

The Court then commented upon the *Dixon* case and noted:

> "* * * It is significant that in the *Dixon* case where the balancing of government and private interests favored the individual far more than here, the court did not suggest that a student must be represented by counsel in an expulsion proceeding."

Ostensibly, the "right" to counsel in disciplinary cases theoretically engenders the right to be warned thereof. However, the respondents herein, as was the Court in *Buttny* v. *Smiley, supra,* are unaware of any

legal authority that requires college officials in disciplinary proceedings to advise a student to remain silent or to be provided with counsel. Moreover, the experience at BSC militates against a rule requiring counsel.[21]

Notwithstanding petitioners' contentions to the contrary, the law as well as the concerns of students and state colleges regarding student disciplinary matters has remained relatively stable throughout the years. Even prior to *Dixon* v. *Alabama State Board of Education, supra,* it was established that a state college could discipline a student for misconduct so long as the actions were not unreasonable, arbitrary, oppressive, capricious or discriminatory. This is the law today.

Admittedly, within the last ten years the courts have looked to the Fourteenth Amendment to determine whether the disciplinary action of the college authorities was lawful and the federal courts have generally been utilized to make this determination. Of necessity, each case has been judged solely on its own facts to determine whether fair play has been accorded with due consideration being given to the duty imposed upon college officials to take appropriate action in the interest of the protection of life and property and the rights of others to also receive an education. The issues in the instant case were thoroughly litigated and the appropriate federal standards were applied in the

[21]The students at BSC became so legal conscious that students demanded that counsel accompany them to informal meetings with faculty members (T. 329, 1023), committee meetings (T. 125), and there were so many attorneys around at several times that at least one administrative member couldn't "remember who they were" (T. 922).

district court; the Court of Appeals agreed. The task of demonstrating error remains unperformed by the petitioners.

CONCLUSION

For the foregoing reasons, the respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

RESPONDENTS' EXHIBIT A

Chapter 72, Acts of the 1947 Legislature, passed March 7, 1947; in effect ninety days from passage. Approved by the Governor.

This Act repealed Chapter 18, Article 2, Secton 2, of the Code of West Virginia, which section established a separate Negro board of education, thereby repealing the inconsistent provisions of West Virginia Code, Chapter 18, Article 14, Section 1, as set out in petitioners' Appendix, at page 25a.

AN ACT to repeal sections two, twelve, sixteen and seventeen, article two, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and to amend and reenact sections one, three, four, five and fifteen, article two, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to the state board of education.

Article 2. State Board of Education.

Section
1. State board of education.
2. Repealed.
3. Meetings of state board; expenses of members.
4. Organization of state board; secretary.
5. General powers and duties.
12. Repealed.
15. Report to governor by state board.
16. Repealed.
17. Repealed.

Be it enacted by the Legislature of West Virginia:

That sections two, twelve, sixteen and seventeen, article two, chapter eighteen of the code of West Virginia, one thou-

sand nine hundred thirty-one, as amended, be repealed, and that sections one, three, four, five and fifteen, article two, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, be amended and reenacted to read as follows:

Section 1. *State Board of Education.*—There shall be a state board of education, to be known as the West Virginia board of education, which shall be a corporation and as such may contract and be contracted with, plead and be impleaded, sue and be sued, and have and use a common seal. The state board shall consist of ten members, of whom one shall be the state superintendent of schools, ex officio, who shall not be entitled to vote. The other nine members shall be citizens of the state, appointed by the governor, by and with the advice and consent of the Senate, for overlapping terms of nine years, except that the original appointments shall be for terms of one, two, three, four, five, six, seven, eight and nine years, respectively. At least one but not more than two members shall be appointed from each congressional district, and at least one member shall be of the Negro race.

No more than five of the appointive members shall belong to the same political party and not more than two members shall be graduates of the same institution of higher education. No person shall be eligible for appointment to membership on the state board who is a member of any political party executive committee or holds any other public office or public employment under the federal government or under the government of this state or any of its political subdivisions, or who is an appointee or employee of the board. Members shall be eligible for reappointment.

The governor shall appoint all members of the state board as soon after the effective date hereof as is practicable for respective terms of office beginning on the first day of July, one thousand nine hundred forty-seven. Any vacancy on the board shall be filled by the governor by appointment for the unexpired term. The terms of office of present members of the state board shall expire on the thirtieth day of June, one thousand nine hundred forty-seven.

No member of the state board may be removed from office by the governor except for official misconduct, incompetence, neglect of duty, or gross immorality and then only in the manner prescribed by law for the removal by the governor of state elective officers.

Before exercising any authority or performing any duties as a member of the state board, each member shall qualify as such by taking and subscribing to the oath of office prescribed by section five, article four of the constitution, the certificate whereof shall be filed with the secretary of state. A suitable office or offices in the state department of education at the state capitol shall be provided for the use of the state board.

Sec. 3. *Meetings of State Board; Expenses of Members.*—The state board shall hold at least six meetings in every year at such times and places as it may prescribe. It may meet at such other times as may be necessary, such meetings to be held upon its own resolution or at the call of the president of the board. The members shall serve without compensation, but every member shall be reimbursed from the general school fund for actual expenses incident to the performance of his duties, upon presentation of an itemized sworn statement thereof.

Sec. 4. *Organization of State Board; Secretary.*—At its first regular meeting in every year, the state board shall elect one of its members as president, who shall not succeed himself as president, and one as vice-president of the board. The state superintendent shall be the chief executive officer of the state board, and subject to its direction shall execute its policies.

The state board shall appoint a secretary and fix his salary, to be paid out of the general school fund upon warrants drawn by the state superintendent. The secretary shall keep a record of the proceedings of the state board and shall perform such other duties as it may prescribe.

Sec. 5. *General Powers and Duties.*—Subject to and in conformity with the constitution and laws of this state, the state

board of education shall determine the educational policies of the state, except as to the West Virginia university and Potomac state school, and shall make rules for carrying into effect the laws and policies of the state relating to education, including rules relating to the physical welfare of pupils, the education of feeble-minded and physically disabled or crippled children of school age, school attendance, evening and continuation or part-time day schools, school extension work, the classification of schools, the issuing of certificates upon credentials, the distribution and care of free textbooks by the county boards of education, the general powers and duties of county boards of education, and of teachers, principals, supervisors and superintendents, and such other matters pertaining to the public schools of the state as may seem to the state board to be necessary and expedient.

Sec. 15. *Report to Governor by State Board.*—On the first day of October of each year, or as soon thereafter as practicable, the state board, through the state superintendent, shall make to the governor and to the Legislature a full report concerning the public schools and the educational institutions under its control and management, together with its recommendations in respect to needed legislation.

CERTIFICATE OF SERVICE

I, Leo Catsonis, Assistant Attorney General of West Virginia, a member of the Bar of the Supreme Court of the United States, and one of counsel for respondents, hereby certify that copies of this Brief in Opposition to the Petition for Writ of Certiorari have been served upon each of counsel of record for the petitioners herein by depositing the same in the United State Post Office, with first class postage prepaid, this 19th day of February, 1969, pursuant to the provisions of Rule 33 (1) of the Rules of the Supreme Court of the United States, addressed as follows: Roy Lucas, 20 East Ninth Street, New York, New York 10003; Melvin L. Wulf, 156 Fifth Avenue, New York, New York 10010; Herbert H. Henderson, 317 Ninth Street, Huntington, West Virginia, 25701; Norman Dorsen, School of

Law, New York University, Washington Square, New York, New York 10003; and Lewis M. Steel, 55 Central Park West, New York, New York 10023, counsel for petitioners.

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